

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN KOLOSKY,

Plaintiff,

v.

Case No. 15-CV-3121 (JNE/LIB)
ORDER

MINNESOTA STATE RETIREMENT
SYSTEM; DAVID BERGSTROM,
Executive Director; MARY BENNER,
Board Chair; TOMMY BELLFIELD, Board
Member; BRYAN DAHL, Board Member;
CHESTER JORGENSEN, Board Member;
SALLY OLSEN, Board Member;
MICHAEL SCHWEYEN, Board Member;
DAVID SENF, Board Member; WES
SKOGLUND, Board Member; JOSEPH
STRUNK, Board Member; JULIE
LEPPINK, Attorney MSRS; and KEVIN
FINNERTY, Office of the Attorney
General,

Defendants.

Plaintiff John Kolosky brought this action alleging that the Minnesota State Retirement System and other defendants violated his rights under the Americans with Disabilities Act, 42 U.S.C. § 12112, et seq., and 42 U.S.C. § 1983 by declining to provide him an application for state disability benefits because the deadline to apply had passed. Instead of paying the filing fee for this action, Kolosky applied to proceed *in forma pauperis*.

In a Report and Recommendation dated August 4, 2015, the Honorable Leo I. Brisbois, United States Magistrate Judge, recommended that the Complaint be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a cause of action on which relief may be granted, and that the application to proceed *in forma pauperis* be denied. Kolosky objected to the Report and Recommendation, and Defendants responded.

The Court has conducted a de novo review of the record, reviewing the Magistrate Judge's analysis, Kolosky's objections, and Defendants' response. The Court acknowledges and appreciates the objections that Kolosky raised. Nevertheless, the Court adopts the conclusions of the Report and Recommendation [Docket No. 3], with one exception. The Report and Recommendation did not specify whether the Complaint would be dismissed with or without prejudice. There is a presumption that dismissal for failure to state a claim on which relief can be granted "is a judgment on the merits made with prejudice," unless the court specifies otherwise. *Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012). Dismissals for failure to state a claim upon which relief may be granted should generally be without prejudice, absent persistent pleading failures. *Milliman v. Cnty. of Stearns*, Civ. No. 13-136 (DWF/LIB), 2013 WL 5426049, at *16 (D. Minn. Sept. 26, 2013).

Therefore, IT IS ORDERED THAT:

1. Kolosky's application to proceed *in forma pauperis* [Docket No. 2] is DENIED.
2. The action is summarily DISMISSED WITHOUT PREJUDICE pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).
3. Defendants' Motion for Dismissal [Docket No. 8] is DENIED AS MOOT.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 16, 2015

s/Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge